INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	5
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Brushaber v. *Union Pac. R. R.*, 240 U. S. 1	8
Burnet v. *Northern Trust Co.*, 283 U. S. 782	9
Commissioner v. *Dahl*, C. C. A. 9th	10
Commissioner v. *Estate of Frances Helen Rawson*, C. C. A. 6th	10
Commissioner v. *Estate of Susan L. Fenimore Cooper*, C. C. A. 2d	10
Commissioner v. *Marshall*, C. C. A. 2d	10, 11
Cooper v. *United States*, 280 U. S. 409	8
Gwinn v. *Commissioner*, 287 U. S. 224	8
Hecht v. *Malley*, 265 U. S. 144	8
Helvering v. *Bullard*, No. 349, October Term, 1937	5, 9
Helvering v. *Helmholz*, 296 U. S. 93	10
Lynch v. *Hornby*, 247 U. S. 339	8
McCormick v. *Burnet*, 283 U. S. 784	9
Milliken v. *United States*, 283 U. S. 15	8
Morsman v. *Burnet*, 283 U. S. 783	9
Reinecke v. *Smith*, 289 U. S. 172	8
Smith v. *United States*, C. C. A. 1st	10
Stockdale v. *Insurance Companies*, 20 Wall. 323	7
Swayne & Hoyt, Ltd. v. *U. S.*, 300 U. S. 297	8
Third Nat. Bank v. *White*, 287 U. S. 577	8
United States v. *Chase Nat. Bank*, 82 F. (2d) 157	10
White v. *Poor*, 296 U. S. 98	10
Statutes:	
Revenue Act of 1926, c. 27, 44 Stat. 9; Sec. 302, as amended (U. S. C., Title 26, Sec. 411)	12
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803 (U. S. C., Title 26, Sec. 411)	13

12787—37

Miscellaneous:

	Page
74 Cong. Rec. 7078, 7198, 7199	7, 9
Treasury Regulations 37, Art. 24	9
Treasury Regulations 63, Art. 20	9
Treasury Regulations 68, Art. 18	9
Treasury Regulations 70, Art. 18	9
Treasury Regulations 80, Art. 18	14
T. D. 4336, XI–1 Cumulative Bulletin 329	6

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER

v.

E. SOHIER WELCH ET AL., EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Thomas B. Hassett, former Acting Collector of Internal Revenue for the District of Massachusetts, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above entitled cause on June 1, 1937, reversing the decision of the District Court of the United States for the District of Massachusetts.

OPINIONS BELOW

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the

Circuit Court of Appeals (R. 119) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 1, 1937 (R. 128). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, should be construed to apply to transfers made prior to the dates of passage of the amendments, and if so applied whether it violates the Constitution.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein will be found in the Appendix, *infra,* pp. 12–14.

STATEMENT

E. Sohier Welch and Sylvester Brown are the executors of the last will of Frank H. Beebe who died on November 20, 1932. (R. 20.) On April 8, 1919, the decedent was appointed co-guardian of the person and estate of his brother, E. Pierson Beebe, who had been adjudged insane, and continued as such until the latter's death on August 8, 1926. (R. 21.) As co-guardian of his brother's

estate, the decedent had the custody of a will drawn by E. Pierson Beebe, prior to his having been declared incompetent, under which the decedent was to receive one-half of his estate. (R. 21.) On February 13, 1924, the decedent transferred in trust the property he expected to receive under the will of E. Pierson Beebe, reserving to himself the income from the property for his life. After his death, the income was to be divided between his nephews and nieces, and after the death of the last survivor, the corpus was to be paid to the living issue of such nephews and nieces. The trust instrument contained no warranty or covenant, nor any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24–25.) After the death of E. Pierson Beebe, the decedent on October 22, 1926, by an instrument in writing, ratified and confirmed the original trust instrument, making no change whatever in its provisions. (R. 25–26.)

After the decedent's death, on November 20, 1932, the Commissioner determined that the value of the corpus of the trust should be included in the gross estate on the ground that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death, in accordance with the provisions of Section 302 (c) of the Revenue Act of 1926. (R. 8, 14.) The District Court affirmed the action of the Commissioner and, in so doing,

found it unnecessary to decide whether the case was governed by Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932, which section, as amended, specifically covered the case of a transfer with the reservation of a life estate in the transferor.

Upon appeal, the Circuit Court of Appeals held that the tax was invalid since the interest of the decedent in the estate of his brother passed out of his hands by his confirmation of the 1924 trust on October 22, 1926, and that the District Court was in error in holding that the transfer was testamentary in character, made in contemplation of death, and intended to take effect in possession or enjoyment after death. The court further held that to apply the provisions of Section 302 (c), as amended, to transfers completed in 1926, was violative of the Fifth Amendment to the Constitution.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Section 302 (c) of the Revenue Act of 1926, as amended by Joint Resolution approved March 3, 1931 (Pub. No. 131), and Section 803 (a) of the Revenue Act of 1932, is unconstitutional as applied to transfers made prior to the dates of passage of the amendments.

2. In holding that the value of the property transferred by the decedent by an irrevocable deed of trust under which he reserved the income from

the property to himself for life, should not be included in the gross estate of the decedent under the provisions of Section 302 (c) of the Revenue Act of 1926, as amended by Section 803 (a) of the Revenue Act of 1932.

3. In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. In holding that Section 302 (c) of the Revenue Act of 1926 (Appendix, *infra*), as amended, is invalid as applied to transfers made prior to the dates of passage of the amendments, the Circuit Court of Appeals has decided an important question of constitutional law which calls for review by this Court. The Commissioner has heretofore filed a petition for certiorari in *Helvering* v. *Bullard,* No. 349, present Term, which involves the validity of the amendatory Resolution of March 3, 1931, as applied to transfers made after that date. If certiorari is granted in the *Bullard* case, it should, we submit, be granted here so that the Court may consider in its entirety the question of the validity of Section 302 (c) as amended. Moreover, as was pointed out in the petition in the *Bullard* case (p. 8, note 2), that case itself may possibly present the question of the validity of the amended Act as applied to transfers made prior to March 3, 1931.

2. The decision below, we submit, rests upon an erroneous view of the principles governing retroactive taxation.

It is clear from an examination of the Act that its provisions apply to transfers made prior to its passage. Not only does the Joint Resolution of March 3, 1931, itself provide that it should apply "to the extent of any interest therein of which the decedent has *at any time* made a transfer by trust or otherwise" (italics supplied), but Section 302 (h) of the Revenue Act of 1926 (Appendix, *infra*) provides specifically that the provisions of subdivisions (b), (c), (d), (e), (f), and (g) of the Section are applicable to transfers, etc., *"whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act"* (italics supplied).

After the passage of the Joint Resolution, the Treasury Department construed the amendment as applying only to transfers made after its passage. (See T. D. 4336, XI–I Cumulative Bulletin 329.) However, on November 7, 1934, the Commissioner promulgated Regulations 80 (Appendix, *infra*), which provided that such transfers should be included within the gross estate unless the transfer was made prior to March 3, 1931, *and* the decedent died prior to June 6, 1932, the effective date of the Revenue Act of 1932.[1]

[1] The legislative history supports this construction. The amendment was not intended to be "retroactive" only in the sense that it was not meant to apply to estates of decedents whose death had already occurred. Refunds in the amount of 25 million dollars were contemplated in the case of such estates. But it was intended to protect the revenues against

The court below was of the opinion that to apply retroactively Section 302 (c), as amended by Section 803 (a) of the Revenue Act of 1932 (Appendix, *infra*), to a transfer completed in 1926 would amount to a taking of property without due process of law in violation of the Fifth Amendment. But there is nothing *per se* fatal about retroactivity. It is only when the imposition is so arbitrary and capricious as to amount to confiscation that the Fifth Amendment comes into play. Numerous Federal income tax Acts have had retroactive application. That is, they were made to apply to income earned prior to passage of the Act under which the tax was imposed. As early as the case of *Stockdale* v. *Insurance Companies*, 20 Wall. 323, this Court stated, with respect to the retroactive application of an income tax Act (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

---

any additional claims. (74 Cong. Rec. 7078, 7199.) Thus Congressman Garner, who stated that the amendment was not to be "retroactive", explained: "The Treasurer estimates that there will be a refund of 25 million to those who have died and had their estate taxed. What we hope in this resolution is to stop up this gap in the future. . . . I have strong hopes that the next Congress will make it retroactive." (74 Cong. Rec. 7199.)

See also *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339; *Cooper* v. *United States*, 280 U. S. 409; *Reinecke* v. *Smith*, 289 U. S. 172.

Similarly, with respect to excise taxes, retroactivity is not of necessity fatal. Cf. *Gwinn* v. *Commissioner*, 287 U. S. 224; *Third National Bank* v. *White*, 287 U. S. 577, affirming *per curiam* 58 F. (2d) 1085 (C. C. A. 1st), affirming 45 F. (2d) 911 (D. Mass.); *Hecht* v. *Malley*, 265 U. S. 144. Where the application of the tax is "free of the elements of novelty and surprise" (*Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 302), it is not arbitrary and unreasonable within the condemnation of the Fifth Amendment. *Milliken* v. *United States*, 283 U. S. 15, is illustrative. In that case, a decedent had made a gift in contemplation of death while the Revenue Act of 1916 was in force. His death, however, occurred after the effective date of the Revenue Act of 1918. The latter statute repealed the former and imposed estate taxes at higher rates. This Court held that the retroactive application of the 1918 Act was not unreasonable. At the time of the transfer the decedent had notice that the transfer probably would be taxed. He therefore should not have been surprised, and to tax his estate under those circumstances was not capricious. In the course of the opinion, this Court said (p. 21):

> But a tax is not necessarily and certainly arbitrary and therefore invalid because

retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court.

Comparable circumstances exist in the instant case. When the trust was confirmed in 1926, the decedent had fair warning that the Government would seek to tax such a transfer. The inclusion of such transfers was regarded as an integral feature of death taxes. See petition in the *Bullard* case, No. 349. The Commissioner had repeatedly construed the provisions of Section 302 (c) as including transfers where life estates had been reserved. See Regulations 37, Art. 24; Regulations 63, Art. 20; Regulations 68, Art. 18; Regulations 70, Art. 18.[2] It seems clear, therefore, that under the facts of this case, Congress was not arbitrarily reaching back into the past. It was simply imposing a tax upon a transfer upon which the decedent had notice that he would probably be taxed. Furthermore, as the grantor lived beyond the dates of the amendatory Acts (which is the only situation

[2] In discussing the Resolution of March 3, 1931, enacted the day following the decisions in *Moreman* v. *Burnet*, 283 U. S. 783; *Burnet* v. *Northern Trust Co.*, 283 U. S. 782; and *McCormick* v. *Burnet*, 283 U. S. 784, the Chairman of the Finance Committee, Senator Smoot, said (74 Cong. Rec. 7078): "The decision of the Supreme Court came almost like a bombshell, because nobody ever anticipated such a decision. * * *. It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first Federal estate tax law in 1916 and its regulations so provide."

where the tax applies, under the Regulations), he could have prevented the operation of the tax by relinquishing his life estate. As was said in *United States* v. *Chase Nat. Bank*, 82 F. (2d) 157, 158:

> She lived several years after the act took effect and she was on notice of its provisions, retaining the reserved powers where she might have given them up to rid her estate of this tax liability. So there has been no denial of rights under the Fifth Amendment.

The decisions in *Helvering* v. *Helmholz*, 296 U. S. 93, and *White* v. *Poor*, 296 U. S. 98, are not to the contrary. The transfers there sought to be included were not made in similar circumstances of administrative construction and understanding of the statutory provision involved.[3]

3. The Bureau of Internal Revenue advises that there are now pending before the Board of Tax Appeals eighty-five cases involving approximately $24,000,000 in taxes, in which the question of the constitutionality of the amendments to Section 302 (c), as applied to transfers made prior to the effective date of the Joint Resolution, is involved.

There are likewise five cases[4] pending in the Cir-

---

[3] While life interests were reserved in those cases, the point was not involved; the grantors had died prior to the enactment of the amendatory acts.

[4] *Commissioner* v. *Dahl* (C. C. A. 9th); *Commissioner* v. *Estate of Frances Helen Rawson* (C. C. A. 6th); *Commissioner* v. *Estate of Susan L. Fenimore Cooper* (C. C. A. 2d); *Commissioner* v. *Marshall* (C. C. A. 2d); *Smith* v. *United States* (C. C. A. 1st).

cuit Courts of Appeals, involving approximately $265,000 in taxes, where the same question is presented. One of such cases has been decided against the Government, but the decision has not yet become final. *Commissioner* v. *Marshall* (C. C. A. 2d). Thus it will be seen that the instant case presents a question of vast importance in the administration of the tax laws, which should be finally settled by a decision of this Court.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

SEPTEMBER, 1937.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) (As amended by the Joint Resolution of March 3, 1931, c. 454, 46 Stat. 1516.) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. (U. S. C., Title 26, Sec. 411.)

[The language in italics represents the new matter added by the 1931 Amendment.]

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishments of pow-

ers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 803. FUTURE INTERESTS.

(a) Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title." (U. S. C., Title 26, Sec. 411.)

* * * * * *

Treasury Regulations 80:

ART. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. See Section 506 of the Revenue Act of 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1937